IN THE COUNTY COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY

STATE OF FLORIDA,
Plaintiff,

vs. Case No. 312019 MM 000560 A

RANDY HINES,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE having come before the Court at the Defendant's Motion to Suppress the surveillance evidence gathered pursuant to two (2) Orders for Surreptitious Entry and Installation of Electronic Surveillance Camera (the "Orders"), on April 23, 2019, the Court having heard the testimony; reviewed the memorandum of law provided by the Office of the State Attorney along with the original memorandum of law as well as the supplemental memorandum provided by the defense; and considering the relevant case law finds as follows:

The defense arguments as to the following issues are without merit: 1) lack of probable cause for the initial approval of the Order on November 27, 2018 and the extension Order on December 28, 2018; 2) claim that the affiant knowingly and intentionally misled Judge Cox and Judge Kanarek pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978) and *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984); 3) claim that the Order only authorized the "monitoring" and not the recording of the cameras; 4) claim that there were less intrusive means of investigation available to the State and that the video surveillance warrant was not a necessity; and 5) the renewal of the Order by Judge Kanarek on December 28, 2018 was not necessary to achieve the stated objectives – gathering evidence of prostitution and evidence of deriving support from the proceeds of prostitution in violation of Florida Statute. It is the opinion of this Court after having given great deference to the Circuit Court Judges that approved the Orders, the Motion to Suppress must be granted because of a fatal flaw in the execution of those Orders.

Summary of the Facts

After having received numerous citizen complaints regarding activity at East Spa located at 2345 14th Avenue, Suite 10 in Vero Beach, Florida. The Vero Beach Police Department began an investigation into possible prostitution taking place at the spa. Detectives did a Google search of the phone number listed for the spa and discovered that the phone number appeared in several ads for escorts and in ads for sex for money. A check of the business through Sunbiz.org found that East Spa was a licensed massage parlor owned by Yongzhang Yan. It was discovered that in addition to East Spa, Mr. Yan owned several other massage parlors in the State of Florida. At this point, Detective Gasbarrini contacted an investigator with the Department of Health and asked the investigator to do an annual inspection of the spa. As a result of that inspection, Linfen Ma and Shuxiang Zhang were identified as licensed massage therapists working at the spa. It soon became known that Lanyun Ma was also associated with East Spa and that she was married to the spa owner, Yongzhang Yan. Ms. Lanyun Ma has a criminal history out of New York and Massachusetts that include charges for human trafficking and prostitution.

On two (2) separate occasions, Detective Chip Brock went into the spa in an undercover capacity for the purpose of receiving a massage. Each time he paid for the service at the front reception desk and was then led to a private dimly lit massage room within the business. Once in the room, Det. Brock was instructed to get undressed and lay face down on the massage table. The massage therapist then entered the room. On each visit, the massage therapist began massaging Det. Brock and then at some point inquired as to whether he would like to engage in various sex acts for additional money.

Law enforcement furthered its investigation by conducting visual surveillance at the spa leading to contact with two (2) men that advised while inside the spa the women conducting the massage offered them sex acts for money. Through the visual surveillance of the spa, law enforcement noticed that large numbers of men were visiting the business and were staying for short periods of time. Visual surveillance of the subjects at the spa saw Lanyun Ma purchase large amounts of condoms at Wal-Mart.

Trash pulls were conducted at the spa on multiple dates and from the garbage law enforcement was able to retrieve napkins with what field tested positive for the presence of seminal fluid along with female hygiene products, mail, receipts and what appeared to be ledgers tracking the amount of money coming into the spa each day.

At this point, law enforcement sought a warrant for the video recording of the interior of East Spa. The recordings that were obtained as a result of the Orders for Surreptitious Entry and Installation of Electronic Surveillance Camera are what are at issue in this case and are what the defense seeks to suppress as an unreasonable search and seizure.

Standing

The first issue to be addressed is the issue of standing. At the hearing, Keith Taig testified under oath that he visited the East Spa in November or December of 2018. He also identified himself as being the person seen in the video which depicts a sexual act between himself and a female. At the conclusion of that testimony, Assistant State Attorney Ryan Butler indicated that the testimony provided by Mr. Taig was sufficient to establish standing to challenge the Order. This Court then entered an Order on Standing for Motion Suppress allowing each of the defendants that joined in the Motion to Suppress or whom filed their own Motion to Suppress to provide an affidavit to the Clerk of Court to establish standing. The defendant has submitted an affidavit or has provided testimony under oath in open court establishing his individual standing to contest the search and seizure conducted in this case.

Legitimate Expectation of Privacy

The State of Florida is also challenging whether the defendant has standing to challenge the Orders because he lacks the requisite expectation of privacy that is protected by the Fourth Amendment from unreasonable searches and seizures. Article I, Section 12 of the Florida Constitution provides that an individual's right against unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art.I, Sec. 12 (Fla. Const.) The State relies on the United States

Supreme Court's ruling in *Minnesota v Carter,* 525 U.S. 83, 119 S.Ct. 469 (1998) for the proposition that the defendant does not have an expectation of privacy in this case. That reliance is misplaced. The Court found in *Carter*, that the defendants in that case did not have an expectation of privacy in an apartment that they were simply visiting for a short period of time for the sole purpose of conducting illicit activity, namely, the packaging of cocaine. The State argues that the defendant in this case does not have an expectation of privacy because he visited the Spa, an open business, for a short period of time for the purpose of conducting illicit activity, receiving a sex act. In support of this argument, the State cites to *State v.* Davis, 623 So2d 622 (Fla. 4th DCA 1993) and *State v.* Conforti, 688 So.2d 350 (Fla. 4th DCA 1997). That analysis fails to recognize that the expectation of privacy is a personal right that attaches to an individual rather than a right that attaches to a particular place. *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684 (1990)

The analysis in the case at issue must focus on whether the defendant had a legitimate expectation of privacy in the massage room of East Spa and whether that expectation of privacy was reasonable. *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421 (1978). Clearly, anyone seeking a massage in a professional setting has a reasonable, subjective expectation of privacy. It is customary that for the purposes of a massage in a spa that is open to the public that the client is escorted to a private secluded room. Once inside the massage room, out of the view of the massage therapist, the client typically removes some if not all of his or her clothing. The defendant in this case did exactly this. Receiving massage services at a spa in some form of undress have become a societal norm and the expectation of privacy one expects while receiving that massage is one society objectively supports as reasonable. *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684 (1990)

Just as there is a reasonable expectation of privacy in a doctor's office, a dressing room or fitting room of a department store or a restroom in a business, it is the opinion of this Court that there is a reasonable expectation of privacy in a massage room and therefore the defendant had a legitimate expectation of privacy that is protected by the Fourth Amendment to the United States Constitution.

Law Applicable to Video Surveillance

Both the defense and the State concede that there is no Florida authority directly on point that allows for surreptitious recording by video pursuant to a search warrant. We must therefore look to federal law for that authority. We find some guidance in *United States v Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990). The court in *Mesa-Rincon,* indicated that a magistrate shall issue an order permitting video surveillance only when:

(1) there has been a showing that probable cause exists that a particular person is committing, has committed or is about to commit a crime;
(2) the order particularly describes the place to be searched and the things to be seized in accordance with the fourth amendment;
(3) the order is sufficiently precise so as to minimize the recording of activities not related to the crimes under investigation;
(4) the judge issuing the order finds that normal investigative procedures have been tried and have failed or reasonably appear to succeed if tried or appear to be too dangerous; and
(5) the order does not allow the period of interception to be longer than necessary to achieve the objection of the authorization, or in any event longer than thirty days.

Mesa-Rincon at 1436.

The real issue for this court is the manner with which the Orders were executed. Specifically, the lack of steps taken by law enforcement to minimize the invasion of privacy to any person not engaged in unlawful acts. Judge Cox signed the Order allowing the installation of cameras at East Spa on November 27, 2018. Homeland Security, working in conjunction with the Vero Beach Police Department determined the locations within the Spa to place the cameras. Homeland Security agents then installed the cameras on November 29, 2018 using equipment belonging to Homeland Security. The cameras were placed to record the front reception desk where clients check in, select the service to be provided from a menu card and then pay for those services. Cameras were also installed in the individual private massage rooms. Once

the cameras were installed at the Spa, they were set to record continuously. At no time over the period of 60 days were the cameras turned off.

Law enforcement began monitoring the cameras on November 30, 2018. Law enforcement was not authorized to monitor or record the innocent person that simply went to the massage parlor for a massage. Yet, that is exactly what occurred. This Court disagrees with the State's assertion that the lack of minimization was not specifically pled in the defendant's Motion to Suppress and should therefore not be considered by the Court. (See Motion to Suppress paragraphs 12 and 16) This Court also finds the State's assertion that it has been "prevented from responding to any specific claim, since none was made" without merit in light of the fact that the State did not submit its State's Response to Defendant's Motion to Suppress until May 6, 2019, well after the nearly four (4) hour Motion to Suppress hearing at which a great deal of testimony was taken concerning the minimization efforts of law enforcement as well as after having received a copy of the Motion to Suppress hearing transcript.

The evidence in this case must be suppressed as a result of law enforcement's disregard of the duties to "minimize the invasion of privacy to any parties not engaged in the unlawful acts set forth in the (search warrant) affidavit" in direct violation of the Order signed by Judge Cox on November 27, 2018 and the Order signed by Judge Kanarek on December 28, 2018. The Affidavits for Surreptitious Entry and Installation of Electronic Surveillance Camera (the "Affidavits") provided broad guidelines for minimization including: "that all monitoring of visual surveillance shall be conducted in such a way as to minimize the visual surveillance and disclosure of the visual surveillance intercepted to those communications relevant to the pending investigation;" surveillance must immediately terminate when it is determined that the video surveillance is unrelated to this investigation;" that video surveillance should, at least, continue for a number of minutes to determine whether or not a sexual act is taking place during, at the beginning, or at the end of a paid for massage." While the Orders themselves did not contain any of those broad guidelines from the Affidavits, the Orders

did state that "the executing officers shall take steps to minimize the invasion of privacy to any parties not engaged in the unlawful acts set forth in the affidavit." [1]

The evidence presented at the Motion to Suppress by the detectives responsible for the monitoring of the cameras at East Spa was that each and every camera installed at the spa recorded **all** activity in the spa for 24 hours a day 7 days a week for 60 straight days whether or not anyone in law enforcement was monitoring the recordings. The cameras recorded on Saturdays and Sundays when law enforcement decided to "take a day off" and not monitor any activity whatsoever at the spa as well as other days that the spa was open for business. The entirety of the 60 days worth of recordings are presently being stored on a server at the Vero Beach Police Department. There was no effort at all on the part of law enforcement to comply with the extremely broad minimization guidelines they themselves requested the Court impose. There is no doubt that this total lack of minimization is anything other than a violation which requires the suppression of all video evidence.

In the State's Response, the State discusses various minimization techniques that have been authorized by Federal Courts over time including intrinsic minimization which occurs when law enforcement discontinues monitoring after they determine that the activity is not relevant to the purpose of the investigation; transcribing only those communications pertinent to the investigation; and extrinsic minimization in which law enforcement would limit the number of hours or days that are monitored. *United States v. Daly,* 535 F.2d 434 (8th Cir. 1976); *Bynum v. United States,* 475 F.2d 832 (2nd Cir. 1973); *United States v. Chavez*, 533 F.2d 491 (9th Cir. 1976) Interestingly, none of the minimization techniques articulated by the State were utilized in this case with the possible exception of what the State argues was "extrinsic minimization". It is the State's contention that extrinsic minimization was done in the present case because law enforcement did not monitor all of the recordings. In fact, the testimony indicated that law enforcement only monitored for 50% of the allowed time – 30 out of the 60 days authorized. That argument would have some merit but for the fact that 100% of all of

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[1] While the defendant does not challenge the language in the orders, this court has doubts about the lack of specificity in the orders as to camera placement, minimization procedures to use with male customers and minimizing the impact on female clients.

the cameras installed intercepted and recorded for the entirety of the 60 days authorized by the Court. Extrinsic minimization would have consisted of powering down the cameras when law enforcement was not actively monitoring the cameras.

Detectives testified that during the time when law enforcement was monitoring the cameras, there were three (3) individuals that were recorded that did not engage in a sex act at the time they were being both monitored and recorded. Had the State been using intrinsic minimization, these three (3) individuals would not have been recorded receiving a legitimate spa service in the privacy of a massage room. But perhaps what is most notable, is that there remains on a hard drive somewhere at the Vero Beach Police Department, recordings that were made but were never monitored – 30 full days worth. We will not know how many more innocent clients were intercepted and recorded simply receiving a massage on a Saturday or Sunday afternoon unbeknownst to them that the government was recording their every move. As stated by Judge Kathleen H. Roberts in her Order in *State v. Frahm*, 2019-000445-MM (Martin County, County Court, May 1, 2019) "the innocent client was treated the same by law enforcement as the criminal element they sought to capture. "

Video surveillance is the most intrusive form of surveillance utilized by the government to investigate crime. As such, it is incumbent upon the government that the rights of private law abiding citizens are not infringed upon during that surveillance. Thus, minimization is a strict requirement under both the Fourth Amendment and *Mesa.* The lack of minimization by the law enforcement entrusted to monitor the cameras requires the suppression of the video recording in this case.

DONE AND ORDERED in Vero Beach, Indian River County, Florida, on this 16th day of May, 2019.

05/16/2019 13:17:00
2019 MM 000360 A

eSigned by MENZ, NICOLE 05/16/2019 13:17:00 6AiVzu-e

Nicole P. Menz, COUNTY JUDGE

cc:
STATE ATTORNEY
ANDREW METCALF, ESQ